IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

UNITED STATES OF AMERICA, ET AL.,	)	
	)	Case No. 1:07CV00054
Plaintiffs,	)	
	)	**OPINION AND ORDER**
v.	)	
	)	By: James P. Jones
UNIVERSAL HEALTH SERVICES, INC., ET AL.,	)	United States District Judge
	)	
Defendants.	)	

Rick A. Mountcastle, Assistant United States Attorney, Roanoke, Virginia, for Plaintiff United States of America; Michael T. Judge, Senior Assistant Attorney General of Virginia, and Erica J. Bailey, Assistant Attorney General of Virginia, Richmond, Virginia, for Plaintiff Commonwealth of Virginia; Daniel R. Bieger, Copeland & Bieger, P.C., Abingdon, Virginia, and Mark T. Hurt, Abingdon, Virginia, for Relators; and Janet S. Nolan and Peter J. Leininger, Fulbright & Jaworski, LLP, Washington, D.C., and Martin A. Donlan, Jr., Williams Mullen, PC, Richmond, Virginia, for Defendants.

In this action under the federal False Claims Act ("FCA"), 31 U.S.C.A. §§ 3729-33 (West 2003 & Supp. 2010), and the Virginia Fraud against Taxpayers Act ("VFATA"), Va. Code. Ann. §§ 8.01-216.1-.19 (2007), the government plaintiffs have moved for leave to file an amended complaint to add a parent corporation. The individual plaintiffs, originally the qui tam relators, have also moved to file an amended complaint to assert their employment retaliation and discrimination claims against the parent corporation. For the reasons that follow, I deny both requests for

leave to amend as futile because the proposed amended complaints show that they have failed to state plausible claims against the parent corporation.

I

In an earlier opinion, I recited the background of this case, which I will again summarize.

The Keystone Marion Youth Center (the "Youth Center"), located in this judicial district, is a residential treatment center designed to provide inpatient psychiatric services to juveniles, most of whom are Medicaid beneficiaries. Medicaid is a joint federal-state governmental program that provides medical benefits to indigent and disabled individuals.

This case began when Megan L. Johnson, Leslie Webb, and Kimberly Stafford-Payne (hereafter, the "Relators"), all of whom are former therapists at the Youth Center, filed a qui tam action pursuant to the FCA and the VFATA. In addition to claiming that false or fraudulent claims were submitted to Medicaid, the Relators claimed that they had been fired in retaliation for their refusal to comply with the fraudulent practices. They also asserted that a supervisor had sexually harassed them and that they had been discriminated against in violation of Title VII of the Civil

Rights Act of 1964, 42 U.S.C.A. §§ 2000e to 2000e-17 (West 2003 & Supp. 2010) ("Title VII") and the Equal Pay Act, 29 U.S.C.A. § 206(d) (West 1998).

Thereafter, the United States and the Commonwealth of Virginia (hereafter collectively, the "Government") intervened in the case and filed a new joint complaint, reasserting the Relators' FCA and VFATA claims. Both the Government and the Relators sued Universal Health Services, Inc. ("UHS"), Keystone Education and Youth Services, LLC ("KEYS"), and Keystone Marion, LLC.[1] UHS is the parent of the other entities. The defendants moved to dismiss both complaints and their motion was granted in part and denied in part. In particular, I dismissed any claims against the parent corporation, UHS, on the ground that there had not been sufficient allegations tying that defendant to any of the alleged wrongful acts. *See United States v. Universal Health Servs., Inc.*, No. 1:07CV00054, 2010 WL 2976080, at *4-5 (W.D. Va. July 28, 2010).

Both the Government and the Relators have now sought leave to file amended complaints that reassert the claims against UHS. UHS objects, and the motions to amend are ripe for decision.[2]

[1] They also sued the Youth Center itself, but that is not a corporate entity capable of being sued.

[2] I will refer to the proposed filings as the Government's Amended Complaint and the Relators' Amended Complaint, respectively.

II

Federal pleading standards require that a complaint contain a "short and plain statement of the claim showing that the pleader is entitled to relief," asserting more than a formulaic recitation of the action's elements. Fed. R. Civ. P. 8(a)(2); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). When a plaintiff alleges fraud, it must also do so with particularity as to the "time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what [was] obtained thereby." Fed. R. Civ. P. 9; *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999).

Under the Supreme Court's recent ruling in *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009), a complaint must contain "plausible" factual allegations that demonstrate more than a "sheer possibility that a defendant has acted unlawfully." In evaluating a pleading, the court accepts as true all well-pled facts and construes those facts in the light most favorable to the plaintiff. *Id* at 1951-52; *Adcock v. Freightliner LLC*, 550 F.3d 369, 374 (4th Cir. 2008). The court need not, however, accept mere labels, assertions, and conclusions, that are unsupported by pleaded facts. *Twombly*, 550 U.S. at 555.

In the present case, *Iqbal's* plausible pleading standard means that the plaintiffs must allege enough facts to show that the parent company knowingly presented a

false or fraudulent claim for payment or approval, or that they made or used false records or statements material to such a claim, in violation of the FCA. *See* 31 U.S.C.A. § 3729(a)(1)(A), (B). The VFATA has virtually identical requirements as to state claims. *See* Va. Code Ann. § 8.01-216.3(1), (2). For the reasons following, the Government's Amended Complaint remains deficient in pleading violations of these statutes by UHS.

The Government alleged in its first complaint that the defendants, as a group, committed the alleged FCA violations, drawing no distinctions between the parent entity and its subsidiaries. I faulted the Government's complaint, in part, due to its failure to make this legally significant distinction. A comparison of the proposed and original complaints reveals that the Government now makes functionally equivalent claims against UHS regarding the submission of false records, statements, and claims that were previously made against the defendants (plural) in its original complaint. The only significant change in the renewed pleadings is that the Government has supplanted the general term "defendants" with a list of UHS employees and executives, UHS Central Billing Office employees at KEYS, and Youth Center employees.

This pleading tactic fails for the same reason that alleging these facts against the defendants in concert failed — namely, these generalized allegations do no more

than to formulaically recite the action's elements without adequately connecting the parent or the listed employees to the records and statements of the subsidiaries. *See Twombly*, 550 U.S. at 555. In order to assert that the parent company actively engaged in the FCA violation, the Government must plausibly allege "'some degree of participation by the parent in the claims process.'" *United States ex rel. Hockett v. Columbia/HCA Healthcare Corp.*, 498 F. Supp. 2d 25, 59-60 (D.D.C. 2007) (quoting *United States ex rel. Tillson v. Lockheed Martin Energy Sys., Inc.*, Nos. Civ.A. 5:00CV-39-M, Civ.A. 5:99CV-170-M, 2004 WL 2403114, at *33 (W.D. Ky. Sept. 30, 2004)). The Government's Amended Complaint as drafted fails to connect the named UHS representatives to the FCA violations in a way that would show such participation.

Because references in the Government's Amended Complaint's to UHS and its employees and executives are oblique and inconsistent, they do not go far enough under *Iqbal* to suggest "more than the mere possibility of misconduct" by UHS. 129 S.Ct. at 1950. While the revised pleadings show consistency with liability, they fail to "[c]ross the line from [the] conceivable to [the] plausible," without providing plainer allegations connecting UHS to an active role in the preparation and submission of these false claims and reports. *Twombly*, 550 U.S. at 570.

The Government's Amended Complaint now also includes allegations of UHS's "corporate control" over KEYS and the Youth Center[3] and that UHS "knew" of conduct by its subsidiaries that was in violation of the FCA.[4] Specifically, the Government demonstrates corporate control by alleging that: (a) "UHS used Keystone Education as a regional office and as a Central Billing Office to facilitate its supervision of [the Youth Center's] operations and finances," and that "[the Youth Center] became a UHS facility and its staff became UHS employees;" (b) Keystone and the Youth Center employees used UHS's email system and an email address using the UHS trade-name; (c) UHS's Central Billing Office regularly corresponded with the Youth Center's business office regarding billing issues; (d) UHS administered a "hotline" to collect complaints about the Youth Center, and some of these complaints were investigated by UHS executives; and (e) UHS Executives, particularly UHS's Clinical Services Vice President Karen E. Johnson, supervised the clinical and billing operations of the Youth Center and they received at least two

[3] The Government does not mention defendant Keystone Marion, LLC.

[4] In my prior dismissal of the claims against UHS, I noted that "[t]he Government Complaint also fails to allege facts that demonstrate that the subsidiaries were the mere alter egos of the parent UHS in order to allow the corporate veil to be pierced." *Universal Health Servs.*, 2010 WL 2976080, at *2. The Government's Amended Complaint does not actually phrase its renewed allegations as an alter ego action or a request to pierce UHS's corporate veil. However, I assume that their allegations regarding corporate control are intended to capture this legal theory.

audit reports and several internal email communications detailing failures in the Youth Center's clinical and billing procedures. (Gov't's Am. Compl. 17-19.) The Government also alleges that UHS "knew" of violations by the Youth Center, as demonstrated by a series of correspondence between UHS executives and Youth Center employees, as well as from the results of the internal audits mentioned above. (*Id*. at 19-22.)

Because this case claims violations of the FCA and relates to federal Medicare, federal law governs the veil-piercing issue. *Hockett,* 498 F. Supp. 2d at 60. Piercing the corporate veil under federal law requires an examination of two elements: (1) whether there was such a unity of interest and ownership that the separate personalities of the parent and the subsidiary no longer existed; and (2) whether respecting the corporate form would produce an inequitable result. *Id.*; *Labadie Coal Co. v. Black*, 672 F.2d 92, 97 (D.C. Cir. 1982). The first element looks to which formalities have been followed to maintain separate corporate identities, and the second element looks to the basic issue of fairness under the facts. *Id.* at 97. If both elements are met, the subsidiary is deemed to be the parent's alter ego, agent, or mere instrumentality. *Hockett*, 498 F. Supp. 2d at 60.

Although the Government's allegations include facts suggesting some overlap between the activities and affairs of UHS, KEYS, and the Youth Center, the type of overlap the plaintiffs allege is hardly unusual in corporate structure, and "courts routinely refuse to pierce the corporate veil based on allegations limited to the existence of shared office space or overlapping management, allegations that one company is the wholly-owned subsidiary of another, or that companies are to be 'considered as a whole.'" *Spagnola v. Chubb Corp.*, 264 F.R.D. 76, 87-88 (S.D.N.Y. 2010) (citation omitted); *see also Key Items, Inc. v. Ultima Diamonds, Inc*., No. 09 Civ. 3729 (HBP), 2010 WL 3291582, at *8-9 (S.D.N.Y. Aug. 17, 2010) (citing post-*Iqbal* examples of alter ego claims dismissed pursuant to 12(b)(6) where the pleadings lack sufficient allegations to plausibly support piercing the corporate veil). [5]

The Government's Amended Complaint also lacks any allegation of an inequitable result should the court choose to respect UHS's corporate form. For example, the Government offers no allegations of inadequate capitalization or

[5] The Government's allegation that "[the Youth Center] became a UHS facility and its staff became UHS employees" fails as the type of broad conclusory allegation that this court must disregard. *See, e.g., USTAAD Sys., Inc. v. iCap Int'l Corp.*, No. 1:09-CV-1149, 2010 WL 2838593, at *3 (M.D. Pa. July 16, 2010) (rejecting pleadings that the corporation was "under the control and domination" of another as conclusory and unsupported by assertations of fact).

insolvency of the subsidiaries; diversion or commingling of assets between the corporations; a failure to observe corporate formalities; or a failure to properly maintain separate corporate records. *See Sourceone Global Partners, LLC v. KGK Synergize, Inc.*, No. 08 C 7403, 2009 WL 2192791, at *3-4 (N.D. Ill. July 21, 2009); *Spagnola*, 264 F.R.D. at 86-88 (listing these types of allegations as those typically seen in an alter ego pleading). At most, the Government's allegations suggest a close supervisory relationship between UHS, as the parent company, towards the activities of its subsidiaries. Without properly pleading that an inequitable result would follow from respecting UHS's corporate structure, the Government's Amended Complaint fails to state a claim for an alter ego action.

Ultimately what the Government's Amended Complaint fails to capture is that a well-pled veil-piercing action alleges not only that an entity in the corporate structure has committed a fraud for which the parent should be held vicariously liable, but also that parental "control is utilized to perpetuate a fraud or other wrong." *Freeman v. Complex Computing Co.,* 119 F.3d 1044, 1053 (2d Cir. 1997). Even if UHS exercised significant supervision over the Youth Center, there still must be allegations that UHS abused the benefits of the corporate form in order to improperly insulate itself from violations of the FCA and VFATA committed by its subsidiaries.

Because the Government has failed to provide such allegations, its amended complaint remains deficient to meet the requirements of Rules 8 and 9(b) on an alter ego theory.

Lastly, the Government's argument that UHS "knew" of violations by the Youth Center fails for similar reasons. Even taking the Government's allegations as true, UHS's knowledge of FCA violations by the Youth Center and failure to investigate or solve the Youth Center's false billing practices does not serve to impose vicarious liability on the parent company without piercing the corporate veil. *See U.S. ex rel. Farmer v. City of Houston*, 523 F.3d 333, 334 (5th Cir. 2008) (granting summary judgment in a FCA action in favor of contractor that submitted inflated invoices to the government, despite knowing they were in part based on a subcontractor's inflated invoices); *United States ex rel. Barlett v. Tyrone Hosp., Inc.*, 234 F.R.D. 113, 125-26 (W.D. Pa. 2006) (finding no vicarious liability against parent company for the FCA violations of its subsidiary, because "knowledge [of violations] does not equate to causing the false claims and submission of false records"). Because the Government has failed to plausibly plead that UHS and its subsidiaries abused the corporate form, the allegations regarding UHS's knowledge of fraud are also insufficient to survive a motion to dismiss.

Rule 15(a) of the Federal Rules of Civil Procedure grants parties leave to amend a complaint, which should be interpreted liberally, "provid[ing] that 'leave to amend a pleading should be denied only when the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment would [be] futile.'" *See Laber v. Harvey*, 438 F.3d 404, 426 (4th Cir. 2006) (quoting *Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 509 (4th Cir. 1986)). However, because the Government's Amended Complaint would be futile as to defendant UHS, I will deny the Government's request to amend.

III

In its motion seeking leave to amend, the Government also requests that the Fraud Enforcement Recovery Act of 2009 ("FERA"), Pub L. No. 111-21, 123 Stat. 1617 (2009), be applied to the entirety of this case.

Between the filing of the original qui tam complaint in this case on June 14, 2007, and the Government's subsequent intervention on March 2, 2010, the FCA was overhauled by the passage of the FERA amendments. Here, the parties dispute whether FERA's retroactivity provision applies to the facts of this case.

Under the amended FCA, subsection §3729(a)(2) was amended and renumbered as subsection §3729(a)(1)(B). The revised subsection provides liability for any person who "knowingly, makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim paid by the government" (emphasis added). This revised subsection altered the original language of (a)(2), which provided liability for any person who "knowingly, makes, uses or causes to be made or used, a false record or statement to get a false or fraudulent claim paid by the government" (emphasis added). The Supreme Court in *Allison Engine Co. v. United States ex. rel. Saunders*, read a specific intent requirement into the language "to get," 553 U.S. 662, 667-68 (2008), and as the legislative history and text of the amendment make clear, Congress intended with the 2009 amendments to eliminate the holding of that case. *See* FERA, §4(a)(1), 123 Stat. at 1621; S. Rep. No. 111-10, at 9. Thus, violations of the FCA brought under the new §3729(a)(1)(B) do not require a pleading of a specific intent to defraud, although those brought under the old §3729(a)(2) do require such a showing.

Whether the revised §3729(a)(1)(B) or the old §3729(a)(2) applies depends on a retroactivity provision of FERA, codified in §3729(4)(f)(1). Subsection (4)(f) states that the pertinent amendments "shall take effect as if enacted on June 7, 2008,

and apply to all claims under the False Claims Act . . . that are pending on or after that date . . . ."

The parties here dispute the meaning of "claims" as used in subsection 4(f)'s retroactivity provision. The Government urges that the word "claims" in this provision denotes all legal causes of action pending under the FCA. The defendants contend that "claims" refer only to actual claims for reimbursement presented to the government. This dispute is significant, because while the Government's cause of action was brought subsequent to the retroactivity date, the Government asserts claims for reimbursement occurring prior to June 7, 2008.[6]

Although this issue appears to be one of first impression within the Fourth Circuit, it has been thoroughly examined in other circuits, with the weight of existing case law supporting the defendants' interpretation. The overwhelming majority of courts have interpreted "claims" to mean claims for reimbursement, not causes of action. *See Hopper v. Solvay Pharm., Inc.,* 588 F.3d 1318, 1327 n.3 (11th Cir. 2009); *United States v. Sci. Applications, Int'l Corp*., 653 F. Supp. 2d 87, 106-08

[6] The Government's Amended Complaint provides charts of "Specific Examples of Defendants' Fraudulent Conduct" detailing dates as early as October 10, 2005 and as late as August 6, 2007. (*See* Gov't's Am. Compl. 29.) However, the Government's Amended Complaint also generally alleges fraudulent conduct by the defendants through March 2, 2010 (*See* Gov't's Am. Compl. 2) ("[B]etween approximately October 2005 . . . and approximately March 2, 2010, Defendants defrauded the United States and the Commonwealth . . ."). The allegations therefore implicate claims made both before and after FERA's retroactivity provision.

(D.D.C. 2009); *see also United States ex. rel. Carpenter v. Abbott Labs., Inc.*, No. 07-10918, 2010 WL 2802686, at *5 (D. Mass. July 16, 2010) (providing a string cite of federal district court cases applying the majority viewpoint, including courts in Texas, New Jersey, New Mexico, Idaho, Illinois, Georgia, Ohio and the District of Columbia).

The Government urges this court to follow the minority interpretation, holding that "claims" as used in the retroactivity clause refers to FCA causes of action. However, the Government's request to decide this issue at this stage of the proceedings is premature. I have already found that the Government has adequately stated a claim as to the remaining defendants, so there is no need to address this matter at this time. I reserve decision on this issue for a more appropriate stage of the case.

IV

The Relators have also moved for leave to file an amended complaint adding UHS to their claims, to which it objects.

In the present case, *Iqbal's* plausible pleading standard means that the Relators must allege enough facts to show that the parent was an "employer" responsible for the alleged FCA and VTAFA retaliation violations and Virginia wrongful discharge

violations of its subsidiary.[7] The FCA does not define "employer," so courts have looked to Title VII for guidance. In the Title VII context, "[t]he fact of a parent-subsidiary relationship between the two companies is not sufficient, as a matter of law, to impute liability to [the parent] for the alleged discriminatory actions of its subsidiary." *Gordon v. Fort Mill Ford, Inc.*, No. 0:07-992-CMC-JRM; 2009 WL 792501, at *8 (D.S.C. Mar. 23, 2009). Rather, the Fourth Circuit has held that "[a] parent company is the employer of a subsidiary's personnel only if it controls the subsidiary's employment decisions or so completely dominates the subsidiary that the two corporations are the same entity." *Johnson v. Flowers Indus., Inc.* 814 F.2d 978, 980 (4th Cir. 1987).

In making this determination, this circuit applies a non-exhaustive four factor "integrated employer" test. This test requires considering: (1) common management; (2) interrelation between operations; (3) centralized control of labor relations; and (4) degree of common ownership/financial control. *Hukill v. Auto Care, Inc.*, 192 F.3d 437, 442 (4th Cir. 1999) (applying the integrated employer test to a claim under the

[7] The Relators originally asserted claims under the Equal Pay Act. However, they have abandoned these claims in their Amended Complaint. The Relators have added a new Virginia common law wrongful discharge claim. *See Rowan v. Tractor Supply Co.*, 559 S.E.2d 709, 711 (Va. 2002) (recognizing a Virginia common law cause of action for wrongful discharge where the discharge was based on an "employee's refusal to engage in a criminal act"). The Relators reassert their original Title VII claims.

FCA); *see also Cottone v. Kindred Rehab Servs., Inc.*, No. 2:08-3953-PMD-RSC; 2010 WL 3187052, at *3 (D.S.C. July 16, 2010) (granting motion to dismiss defendant parent corporation in §3730(h) case where the plaintiff's pleading did not contain plausible allegations of the above factors).[8] Although no single factor is conclusive, the control of labor relations is the most significant factor for defining whether the parent qualifies as an "employer" for Title VII purposes.[9] *Hukill*, 192 F.3d at 442.

Here, the Relators' Amended Complaint contains scant allegations concerning any of these factors. The Relators' pleadings are limited to conclusory allegations that "upon information and belief . . . UHS exercised direct control over the operations of the Youth Center;" that one UHS official had "direct supervisory authority" over Youth Center employees; and that a UHS attorney met with two of the Relators regarding their employment issues. (Relators' Am. Compl. 3, 14, 15.)

These pleadings do not contain allegations that could make a plausible claim

[8] This test has been previously applied in cases involving other civil rights statutes. *See, e.g. Hukill*, 192 F.3d at 442 (Family and Medical Leave Act); *Swallows v. Barnes & Noble Book Stores, Inc.*, 128 F.3d 990, 993-94 (6th Cir. 1997) (Age Discrimination in Employment Act and Americans with Disabilities Act).

[9] Virginia's doctrine for piercing the corporate veil, the standard applicable to the Relators' wrongful discharge claim, is even more stringent in its distinction between parent and subsidiary. *See, e.g. Vanburen v. Va. Highlands Orthopaedic Spine Ctr.*, No. 7:10CV00132, 2010 WL 2985979, at *6-7 (W.D. Va. July 28, 2010) (applying Virginia alter ego doctrine to wrongful discharge claim and denying to pierce the corporate veil based on Virginia's alter ego standard and the intended narrow scope of the wrongful discharge tort).

that UHS dominated or controlled the employment decisions at the Youth Center. Therefore, the parent corporation UHS cannot be said to be the Relators' "employer" as defined under Title VII or under Virginia common law, and I must deny Relators' leave to amend.[10]

V

For the reasons stated, it is **ORDERED** as follows:

1. The Plaintiffs' Joint Motion for Leave to File a First Amended Complaint (ECF No. 81) is DENIED; and
2. The Relators' Motion for Leave to Amend Complaint (ECF No. 85) is DENIED.

ENTER: October 31, 2010

/s/ JAMES P. JONES
United States District Judge

[10] The Relators have requested that I consider the recent case of *Speaker v. U.S. Dep't of Health & Human Servs. Ctrs. for Disease Control & Prevention*, No. 09-16154, 2010 WL 4136634 (11th Cir. Oct. 22, 2010), but I do not find that case changes my analysis.